(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

WINSLOW R. LIEVSAY,

Petitioner,

v.

WESTERN FINANCIAL SAVINGS BANK, F.S.B., a Federal Savings Bank, and UNITED STATES TRUSTEE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

1. Did the new 11 U.S.C. §1123(b)(5) bankruptcy law section prohibiting the modification of a claim secured **only** by principal residence realty, preclude this reorganizing chapter 11 debtor from invoking 11 U.S.C. §506(a) to bifurcate and treat separately the secured and unsecured components of Respondent's claim; when the security included debtor's residence **and other additional security**?

2. Did 28 U.S.C. §1292(b), which empowers a federal **district court** judge to certify an order to be appealable to the circuit court of appeals, similarly empower the Ninth Circuit **Bankruptcy Appellant Panel** (BAP) to certify the above question in our matter to be appealable to the Ninth Circuit Court of Appeals when the BAP was acting in lieu of the district court?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 6

REASONS FOR ALLOWANCE OF WRIT 9

FIRST QUESTION *9*

SECOND QUESTION *18*

CONCLUSION 20

APPENDIX .....

CIRCUIT ORDER
OCTOBER 31, 1997 ..... *APP. 1*

CIRCUIT ORDER
JULY 1, 1997 ..... *APP. 2-4*

BAP DECISION
AUGUST 14, 1996 ..... *APP. 5-12*

RESPONDENT'S ADDITIONAL
LOAN SECURITY ..... *APP. 13-14*

TABLE OF AUTHORITIES

Cases Cited ..... ***Page***

Belcher v. Aaron (1937)
8 Cal. 2d 180, 182, 64 P.2d 402 ..... *17*
In re Bruce,
40 B.R. 886-88(Bankr.W.D.Va. 1984) *13*
Butner v. United States,
440 U. S. 48,99 S.Ct. 914 ..... *16*
In re Caster,
77 B. R. 8(Bkrtcy.E.D.Pa 1987) *13*
Connecticut Nat'l Bank v. Germain,
503 U.S. 249, 112 S. Ct. 1146,
117 L. Ed. 2d 391, (1992) *9,18,19,20*
In re Eastwood,
192 B.R. 96
(Bankr. D. N. J. 1996) *10,11,12,16,17*
Freeman v. Campbell (1895)
109 Cal. 360, 363, 42 P. 35 ..... *17*
In re Hammond, 156 B.R. 943,947 ..... *11*
In re Hammond, 27 F.3d 52
(3d Cir. 1994) *6,9,10,11,12,13,14,15*
In re Jackson, 136 B.R. 797, 802-03 (Bankr.
N.D.Ill. 1992) *17*
In re Jason Realty, 59 F.3d 423
(3rd Cir. 1995) *17*
Kinnison v. Guaranty Liquidating Corp. (1941)
18 Cal. 2d 256, 260,
115 P.2d 450 ..... *17*
In re Lievsay, 199 B. R. 705
(9th Cir. BAP 1996) *1,8,11,12,13,14,19*

In re Lievsay,
118 F.3d 661 (9th Cir. 1997) 1,8
Locke v. Klunker (1898)
123 Cal. 231, 235, 55 P. 993..... 17
Lomas Mortg. V. Louis,
82 F.3d 1 (1st Cir. 1996)..... 10,12
In re Neal,
10 B. R. 538-40(Bankr S.D. Ohio 1983)..... 13
In re Nicholes,
184 B. R. 82, 86-87 (9th Cir. BAP 1995)..... 7
Nobelman v. American Savings Bank,
508 U.S. 324 (1993),
113 Sup. Ct. 2106 (1993)..... 10,11,13,14,16
In re Pinto,
191 B. R. 610,614 (Bankr.D.N.J.1996) 10,11
In re Price, 79 B.R. 888, 889
(9th Cir. BAP 1987),
aff'd, 871 F.2d 97 (9th Cir. 1989)..... 7
In re Ramirez, 62 B.R. 668
(Bankr.S.D.Cal. 1986)..... 6,9,10,11,12,14
Roosevelt Campobello Int'l Park Comm'n
v. U.S.E.P.A., 711 F.2D 431,436-437
(1ST Cir. 1983)..... 9
In re Sapos,
967 F.2d 918 (3d Cir. 1992)..... 10,13
Seatrain Shipbuilding Corp. v
Shell Oil Co., 444 U. S. 572, 596,
100 S. Ct. 800, 813-814,
63 L.Ed.2d 36 (1980) 9
In re Sperna, 173 B. R. 654, 657-58
(9th Cir. BAP 1994)..... 7,8
In re Vurchio, No. 95-30570
(Bankry.D. of N.J. 1996)..... 12

Wilson V. Commonwealth Mortg. Corp,
895 F.2d 123 [22 C.B.C.2d 561] (3d Cir. 1990)
..... *10,13,14,15*

OTHER AUTHORITIES

140 Cong. Rec. H 10,764 (daily ed. October 4, 1994).....*6*

5 Collier on Bankruptcy 1322.06[1][a] 1322-23 n. 13.....*12*

5 Collier on Bankruptcy 1322.06 1322-14-15
.....*15*

David J. Jesulaitis, COMMENT: LIEN STRIPPING AFTER NOBELMAN V. AMERICAN SAVINGS BANK*: WHAT IS "ADDITIONAL COLLATERAL"?, HOUSTON LAW REVIEW, Vol 32:201,230* *10,12*

K. Lundin, CHAPTER 13 BANKRUPTCY, S4.44 (1994).....*10*

Matthew Bender & Company, Inc., California Real Estate Law & Practice [R49 3/96], VOL 4, P 111.51[1].....*17*

PETITION FOR WRIT OF CERTIORARI

Petitioner, Winslow R. Lievsay, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Bankruptcy Appellate Panel for the Ninth Circuit decided August 14, 1996 left standing by an extraordinary denial of jurisdiction by the Ninth Circuit Court of Appeals on July 1, 1997 and the circuit's subsequent denial for rehearing on October 31, 1997.

OPINIONS BELOW

In re Lievsay, 199 B. R. 705 (9th Cir. BAP 1996)

Published opinion of the Bankruptcy Appellate Panel of the United States Ninth Circuit (BAP) granting leave to appeal the Bankruptcy Court's interlocutory denial of confirmability of petitioners plan because 'substantial difference of opinion among the circuits' on the controlling issue, and upon a *de novo* review affirming the lower court. (App. 5-12)

In re Lievsay, 118 F.3d 661 (9th Cir. 1997)

Published opinion of the United States Ninth Circuit Court of Appeals (Circuit) dismissing petitioner's appeal from the BAP's aforesaid ruling based upon lack of statutory jurisdiction under 28 U.S.C.A. § 1292. (App. 2-4)

OTHER RELEVANT OPINION BELOW

On October 31, 1997 the Circuit denied petitioner's petition for rehearing and denied a companion suggestion for rehearing *en banc*. (App. 1)

JURISDICTION

Judgment of the United States Ninth Circuit Court of Appeals was entered on July 1, 1997, and a petition for rehearing and suggestion for rehearing en banc was denied October 31, 1997. This Court's jurisdiction to consider this petition from the final judgment or decree by a court of appeals may be invoked pursuant to 28 U.S.C. § 1254.

This matter had its first federal jurisdiction in the United States Bankruptcy Court Central District of California with Petitioner's November 7, 1994 filing therein a Voluntary Chapter 11 Petition for a business reorganization under Title 11 of the United States Bankruptcy Code. – 11 U.S.C. §§ 101-et seq.

STATUTORY PROVISIONS

FEDERAL

(a) Bankruptcy Law 11 U.S.C. § 1123(b)(5)

... Contents of plan. ... (b) ... a plan may-- (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence,...

(b) Bankruptcy Law 11 U.S.C. § 1322(b)(2)

(b) ... the plan may ... (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, ...

(c) Bankruptcy Law 11 U.S.C. § 506(a)

... An allowed claim of a creditor secured by a lien on property in which the estate has an interest, ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim.

(d) *Judiciary and Judicial Procedure Law 28 U.S.C. §158 (c)(1)*

Subject to subsection (b), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless - (A) the appellant elects at the time of filing the appeal; or (B) any other party elects, not later than 30 days after service of notice of the appeal; to have such appeal heard by the district court

(e) Judiciary and Judicial Procedure Law 28 U.S.C. §1292 (b)

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order ...

STATE

California Civil Code §2927

"A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; ..."

California Code of Civil Procedure §564(b)(10)

§564 ... (b) "In superior court a receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in the following cases: ... (10) In an action by a secured lender for specific performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment document. In addition, that appointment may be continued after entry of a judgment for specific performance in that action, if appropriate to protect, operate, or maintain real property encumbered by the deed of trust or mortgage or to collect the rents therefrom while a pending nonjudicial foreclosure under power of sale in the deed of trust or mortgage is being completed."

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STATEMENT OF THE CASE

Petitioner, filed a chapter 11 petition in November, 1994. The bankruptcy estate's assets included real property, which served as both a primary personal residence and a primary business office. The property, which had a fair market value of approximately $260,000, was subject to a secured claim of Respondent, WESTERN FINANCIAL SAVINGS BANK, F.S.B., a Federal Savings Bank, ("WFS") of approximately $312,000. Petitioner's plan proposed to bifurcate WFS' claim into secured and unsecured components pursuant to 11 U.S.C. §506(a).

WFS opposed the plan and argued that 11 U.S.C. §1123(b)(5)[4], which limits a debtor's ability to modify a claim secured only by a security interest in real property that is the debtor's principal residence, prohibited the bifurcation of its claim. The debtor argued that section 1123(b)(5) did not prohibit the proposed bifurcation because WFS' claim was secured by

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[4] Enacted in 1994 with these Congressional introductory remarks by rep. Jack Brooks: "This amendment conforms the treatment of residential mortgages in chapter 11 to that in chapter 13 [11 U.S.C. §1322(b)(2), preventing the modification of the rights of a holder of a claim secured only by a security interest in the debtor's principal residence. Since it is intended to apply only to home mortgages, it applies only when the debtor is an individual. It does not apply to a commercial property, or to any transaction in which the creditor acquired a lien on property other than real property used as the debtor's residence. See In re Hammond, 276 F.3d 52 (3d Cir. 1994); In re Rameriz [Ramirez], 62 B.R. 668 (Bankr.S.D.Cal. 1986)." 140 Cong. Rec. H 10,764 (daily ed. October 4, 1994).

property other than the debtor's principal residence.[5]

The bankruptcy court found that the deed of trust language did not divest WFS of its section 1123(b)(5) protection and entered an order denying confirmation of the plan.

Petitioner appealed this interlocutory order to the Bankruptcy Appellate Panel for the Ninth Circuit (BAP) which used 28 U.S.C. 1292(b) to grant leave to appeal by ruling :

> " ... substantial differences exist among the circuits' treatment of bifurcation of home mortgages that contain additional collateral language ... *In re Nicholes*, 184 B.R. 82, 86-87 (9th Cir. BAP 1995)[6] (leave to appeal is appropriate

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[5] The items securing the deed included: (1) "all the improvements now or hereafter erected on the property, and all easements, rights appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights and stock and all fixtures now or hereafter a part of the property and all replacements and additions." ;and (2) 'Borrower shall pay ... "Funds" .. equal to .. taxes ... insurance premiums ... called "escrow items". ... pledged as additional security for the sums secured by this Security Instrument'; and (3) "... Upon acceleration [before foreclosure] ... Lender ... shall be entitled ... to collect rents ... Any rents collected shall be applied ... to the sums secured by this Security Instrument ..." (App. 14).

[6] Nicholes cites In re Sperna, 173 B.R. 654, 658 ((9th Cir. BAP 1994) which ruled: "The Panel looks to the standards set forth in 28 U.S.C. §1292(b) to determine if leave should be granted. *In re Price*, 79 B.R. 888, 889 (9th Cir. BAP 1987), aff'd, 871 F.2d 97 (9th Cir. 1989). Under that statute, granting leave is appropriate if the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. Id."

> when differences of opinion exist between controlling issue and immediate appeal may materially advance the ultimate termination of litigation" Lievsay Id. (App. 8)

After hearing arguments and conducting a *de novo* review, the BAP found:

> "Section 1123(b)(5) is intended to protect a particular class of lenders; its reach should be construed strictly to keep the lender from overreaching and to effectuate the fresh start policy of the Code. However, the "additional collateral" language in the deed of trust is so closely associated with securing the primary residence that it prohibits Debtor from stripping down the lien under section 1123(b)(5). Therefore, we AFFIRM the court's order denying approval of Debtor's plan." Lievsay id. (App. 12).

The Petitioner appealed from the BAP's opinion to the Ninth Circuit Court of Appeals which the circuit dismissed for lack of jurisdiction in a published finding:

> "Jurisdiction is ... not conferred on this court by ... [28 U.S.C. §] 1292 ...Neither section 1291 nor 1292 applies to appeals from the BAP" (App. 4).

Petitioner petitioned the circuit for a rehearing noting the BAP's 28 U.S.C. § 1292 certification that the main issue was one creating substantial difference of opinion among the circuits' and suggesting that the Ninth

Circuit's order controverts the Supreme Court's jurisdictional implications in Connecticut Nat. Bank v. Germain (1992) 503 US 249, 117 L. Ed 2d 391, 112 S. Ct. 1146. Nevertheless, the circuit on October 31, 1997 denied the rehearing petition and its companion suggestion for en banc rehearing. (App. 1)

REASONS FOR ALLOWANCE OF WRIT

FIRST QUESTION

The Petitioner respectfully suggests that by denying jurisdiction to hear the appeal of the BAP's order in this matter, the United States Court of Appeals for the Ninth Circuit has allowed a BAP published decision to stand in conflict with other decisions of United States courts of appeals. One such other circuit decision[7] and a district court decision[8] in conflict with the BAP decision have been declared by Congress to be the correct statements of law on our issue.[9] In addition, the BAP's decision has failed to apply relevant California law in conflict with the directions of the U.S. Supreme Court and the California Supreme Court. This flawed decision, if left to stand as published, will add an unnecessary log to an intracircuit

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[7] In re Hammond, 276 F.3d 52 (3d Cir. 1994).

[8] In re Ramirez, 62 B.R. 668 (Bankr.S.D.Cal. 1986).

[9] " ... subsequent Congressional declaration of an act's intent is entitled to great weight in statutory construction." Roosevelt Campobello Int'l Park Comm'n v. E.P.A., 711 F.2d 431, 436-37 (1st Cir. 1983) (citing Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980)).

and intercircuit fire of controversy[10] on our additional security question. New Congressional guidance[11], new and relevant circuit case law[12], and scholarly relevant commentaries[13] make this matter ripe for the Supreme Court to author a decision highly useful to the lower courts' struggling with this issue under either 11 U.S.C. §1123(b)(5) or 11 U.S.C. §1322(b)(2).

In a closely related case[14], the Supreme Court did not explicitly deal with our additional security issue[15] when it prohibited an 11 U.S.C.

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[10] K. Lundin, CHAPTER 13 BANKRUPTCY, S4.44 (1994) "The "boilerplate" case law is hopelessly irreconcilable because Congress did not contemplate that the intensely technological language of mortgage instruments would be tested against the simple but precise language of S1322(b)(2).... No peace will come to this area of law until Congress clarifies the statute" [Which petitioner suggests herein that Congress has now done].

[11] remarks of rep. Jack Brooks supra, citing *In re Hammond*, 276 F.3d 52 (3d Cir. 1994) ... *In re Ramirez*, 62 B.R. 668 (Bankr.S.D.Cal. 1986) as examples of exceptions to 11 U. S. C. § 1123(b)(5). This Congressional citation facilitates a decision dealing with the controversies surrounding both 11 U. S. C. §1123(b)(5) and §1322(b)(2).

[12] Lomas Mortg. V. Louis, 82 F.3d 1 (1st Cir. 1996); In re Hammond, 276 F.3d 52 (3d Cir. 1994).

[13] See Lundin note 6 supra and David J. Jesulaitis, Comment: Lien Stripping After *Nobelman V. American Savings Bank*: What Is "Additional Collateral"?, Houston Law Review, Vol 32:201,230: A recipient of the 1994 Porter & Hedges, L.L.P. Award for the most outstanding paper in the field of bankruptcy or corporate law. An often cited thorough compilation and classification of the additional security case conflicts (through 1994).

[14] Nobelman v. American Savings Bank, 113 Sup. Ct. 2106, 508 U.S. 324 (1993).

[15] Hammond, Id.: "We conclude that *Nobelman* does not overrule our holding in *Wilson* or *Sapos* that a mortgagee who wishes to avoid bifurcation of its claim on a

§506(a) bifurcation where the applicability of the precursor[16] to 11 U.S.C. §1123(b)(5) was not contested. Regretfully, the bankruptcy courts have continued their string of conflicting additional security decisions. When the Ninth Circuit BAP referred to this conflict, it punctuated its comments with citations of two 1996 Third Circuit cases in conflict with each other on identical 'additional security' language to that in our matter[17]. The conflicts with 11 U.S.C. §1322(b)(2) have now overflowed into

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residential mortgage must limit its lien to the real estate." See also In re Hammond, 156 B.R. 943,947 (E.D.Pa. 1993) (commenting that the mortgage in Nobelman was actually secured by more than the residence alone and commenting on the lack of clarity resulting from the Supreme Court's reticence on this issue), aff'd, 27 F.3d 52 (3d Cir. 1994) Although the debtor pursued this argument neither the Fifth Circuit nor the Supreme Court addressed this issue in their respective holdings.

[16] 11 U.S.C. 1322(b)(2): In our matter, the BAP found the judicial history of section 1322(b)(2) relevant: "Because section 1123(a[b])(5) is relatively new, there are few cases interpreting its effect. There is, however, extensive case law regarding the interaction of section 506 and section 1322(b)(2). Given the congressional intent to harmonize the two chapter's treatment of home mortgages, and the nearly identical language of the two sections, we will use these cases to guide us here." Lievsay Id. at 708. (App. 9)

[17] Lievsay, Id. '*See also, In re Eastwood*, 192 B.R. 96, 104-05 (Bankr.D.N.J.1996) (finding that language identical to that considered here did not grant "additional collateral" to the bank holding the security interest in the debtor's property), *But see In re Pinto*, 191 B.R. 610,614 (Bankr.D.N.J.1996) (on identical language, finding that the bank had a "security interest in additional collateral" and therefore was not within the protection of the antimodification provision).' (App. 10)

decisions involving 11 U.S.C. §1123(b)(5)[18]. At the heart of these conflicts is the task of equitably balancing the Congressional fresh start policy of the code with its desire to protect the home lending capital industry [19].

In 1994, Congress, after reviewing the judicial history of 11 U.S.C. §1322(b)(2)[20], came down hard on the side of a Debtor's fresh start by explicitly declaring the Hammond and Ramirez cases to be examples of exceptions to the applicability of 11 U.S.C. §1123 (b)(5). That Congress did indeed declare these cases as the correct law on this subject is authoritatively acknowledged[21].

The Hammond case and its Third Circuit antecedents teach that the fresh start intentions of Congress should narrow interpretations of 11 U.S.C. §1322(b)(2)[22]

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[18] Compare Lievsay *sub judice* with In Re Vurchio, No. 95-30570 (Bankry.D. of N.J. 1996) Official Transcript decision Pages 20-21 the Vurchio court ruled in favor of debtor's bifurcation on same language as *sub judice* under 11 U.S.C. §1123(b)(5). in direct conflict with the BAP. Vurchio acknowledged but ignored its own Circuit's Eastwood because of the lender's 'escrow account' additional security forbidden by Hammond. [Eleven copies of the transcript of the Vurchio opinion have been lodged with the Court]

[19] *Jesulaitis*, note 9 supra at 229.

[20] Lomas Mortg. V. Louis, 82 F.3d 1 (1st Cir. 1996) at 6: "The legislative history of Section(s) 1123(b)(5) reveals that Congress deliberately tracked the antimodification language of Section(s) 1322(b)(2) and intended conformity of treatment between Chapter 13 and Chapter 11."

[21] Lomas Id at 7. and 5 Collier on Bankruptcy 1322.06[1][a] 1322-23 n. 13.

[22] '..we believe a narrow interpretation of § 1322(b)(2) is posited in the context of the Congressional intention "to make available the chapter 13 remedy to a wide range of financially distressed debtors..."

In our matter, the BAP was in accord when it found that 11 U.S.C. §1123(b)(5)

> " ... should be construed strictly to keep lenders from overreaching and to effectuate fresh start policy of Bankruptcy Code ..."[23]

Prior to the Congressional endorsement of Hammond, the Nobelman[24] court had signaled a bias towards protection of the home lending industry. Nobelman's alleged tacit treatment of our issue has been a cornerstone of the Respondent's argument in the courts below[25]. However Hammond is post Nobelman. Hammond categorically denies that Nobelman treated our issue tacitly or otherwise[26]. And finally, Hammond was declared post Nobelman by Congress to be the correct statement of law

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In re Caster, 77 B. R. 8(Bkrtcy.E.D.Pa 1987) citing *In re Neal*, 10 B. R. 538-40(Bankr S.D. Ohio 1983)and citing Accord, *In re Bruce*, 40 B.R. 886-88(Bankr.W.D.Va. 1984).

[23] In re Lievsay, 199 B.R. 705 (9th Cir.BAP 1996) at 706. (App. 10)

[24] Nobelman, supra.

[25] Not without authority see In re Hirsch, 166 B. R. 248,254 (E.D.Pa. 1994) reasoning that the Nobelman did make such a tacit decision.

[26] Hammond at 56 "..but neither the United States Court of Appeals for the Fifth Circuit nor the Supreme Court addressed the [additional property] issue on appeal. ... the Supreme Court's decision in *Nobelman* did not expressly or implicitly overrule this Court's alternate rational for its decisions in *Wilson* and *Sapos*. Therefore, we conclude that a mortgage which creates security interests in a debtor's personal property in addition to a lien on the mortgagor's principal residence takes the mortgage beyond the protection of the anti-modification clause of section 1322(b)(2) of the Bankruptcy Code".

on our issue. It is therefore settled that, as regards any relevance to our issue, the Nobelman decision has been overruled by Hammond by Congressional declaration.

The BAP decision in our matter is in direct conflict with Hammond. The BAP reasoned that although Petitioner does have his home office in the property, and notwithstanding Ramirez, which disqualified §1322(b)(2) protection where secured property was used for a non-principal residence business purpose:

> "...[Petitioner] has not shown that this [business] use added significant value to the property or that the bank relied on the additional security offered by his home office. In the absence of that proof, we are not prepared to say that the bank had sufficient security in assets that were not part of the debtor's principal residence that the bank should be denied the protection of section 1123(b)(5)".[27]

Hammond overruled this logic:

> "In *Wilson*[28], we addressed and rejected an identical argument that an additional security interest in personal property on or in the real estate securing a residential mortgage has no real value and can be ignored under the maxim *de minimus on curat lex.*<7>[29] *see Wilson*, 895 F.2d at 129.

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[27] Lievsay, supra at 709. (App. 12)

[28] Wilson v. Commonwealth Mortg. Corp., 895 F.2d 123 (3d Cir. 1990).

[29] 'The Latin means: "The law does not care for, or take notice of, very small or trifling matters. The law does not

> We held in *Wilson* that section 1322(b)(2)'s language plainly states that a mortgagee who has an additional security interest gets no protection from the antimodification clause of section 1322(b)(2). *Id.* ("The language of section 1322(b)(2) is unambiguous. The language of the bankruptcy judge bears repeating: 'If Commonwealth wishes otherwise, it should delete such language from its agreements. '")." [30]

Hammond explicitly disqualified loans requiring 'escrow item' security such as Respondent's (App. 14) from antimodification protection:

> "We also relied on *Collier on Bankruptcy* to buttress our holding that creditors who demand additional security interests in personalty or **escrow accounts** and the like pay a price. Their claims become subject to modification. Their recourse, if they wish to avoid modification, is to forego the additional security. *Id.* (citing 5 Collier on Bankruptcy P 1322.06 at 1322-14-15)."[31] [Emphasis added]

The Petitioner submits that the BAP decision cannot stand with Hammond's Congressionally mandated correct statement of the law on our issue.

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concern itself about trifles." Black's Law Dictionary 388 (5th ed. 1979).' Hammond, Footnote 7.

[30] Hammond Id 56-57.

[31] Hammond Id 56-57.

Additionally, the BAP decision fails to apply California law as called for by: (1) the U.S. Supreme Court, (2) the California Supreme Court, and (3) the BAP's own supporting citation, Eastwood.[32]

(1) The U.S. Supreme Court held that bankruptcy matters look to state law to define real and personal property rights:

> "In the absence of a controlling Bankruptcy Code definition, it must be presumed that Congress left the determination of property "rights" in estate assets to state law.) Butner v United States, 440 US 48, 54-55, 59 L Ed 2d 136, 99 S Ct 914." Nobelman Id.

(2) Four California Supreme Court decisions make security such as respondent's 'additional' when specified in the trust deed:

> "Most trust deeds contain some type of rents-and-profits clause which provides that the beneficiary, his or her agent, or a court-appointed receiver has the right upon default to take possession of the premises and sue for or collect the rents, issues, and profits from the property. **If the security** or separate agreement **does not give the beneficiary the right to take possession** and collect or sue for the

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[32] Eastwood is a case cited in support of the BAP's decision. (App. 11-12).

rents and profits, **he or she may not do so**. "(emphasis added)[33]

The Illinois courts have acknowledged that this form of 'additional' security disqualifies antimodification protection where that state's laws are like those in California.[34]

(3) Eastwood relied upon an argument that if the deletion of the additional property clause did not effect security under state law then it was not 'additional'[35]. But the California Supreme Court has ruled that rights to possession and "rents" when denoted in a Trust Deed add significant 'additional' security, which the lender would not otherwise enjoy. Thus although the BAP's Eastwood citation superficially seems to support its decision, it truly does the opposite.[36]

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[33] Matthew Bender & Company, Inc., California Real Estate Law & Practice [R49 3/96], VOL 4, P 111.51[1] citing California Supreme Court Cases Kinnison v. Guaranty Liquidating Corp. (1941) 18 Cal. 2d 256, 260, 115 P.2d 450. Belcher v. Aaron (1937) 8 Cal. 2d 180, 182, 64 P.2d 402, Locke v. Klunker (1898) 123 Cal. 231, 235, 55 P. 993; and Freeman v. Campbell (1895) 109 Cal. 360, 363, 42 P. 35; and citing Civ. Code S 2927, and Code Civ. Proc. S 564(b)(10).

[34] In re Jackson, 136 B.R. 797, 802-03 (Bankr. N.D.Ill. 1992) (rents, issues and profits were collateral other than a principal residence where, under Illinois law, a mortgagee had no right to rents absent an express pledge thereof).

[35] Eastwood at 106.

[36] Eastwood at 106 note 20 citing In re Jason Realty, 59 F.3d 423 (3rd Cir. 1995) where the court specifically found that an assignment clause within a mortgage may be independent from the mortgage security.

SECOND QUESTION

The Petitioner respectfully suggests that the circuit's published denial of its statutory jurisdiction is contrary in principle to a relevant ruling of the Supreme Court in Connecticut Nat. Bank v. Germain (1992) 503 U.S. 249, 117 L. Ed 2d 391, 112 S. Ct. 1146[37]. The Ninth Circuit has held in our case that 28 U.S.C. §1292(b) appealability may be authorized by district courts only. Such a ruling makes Bankruptcy Appellate Panels unwanted barren stepchildren which bankruptcy appellants will shun because they lack 28 U.S.C. §1292(b) appealability. The consequent appellant rush to district courts[38] fertile with 28 U.S.C. §1292(b) appellate rights would be inconsistent with the Congressionally intended roles for the BAP's. In its role as an alternative appeals path, a BAP is supposed to free district courts from civil bankruptcy matters by providing a robust circuit bankruptcy forum. A published opinion, which acts to detour appeals around the BAP's and route them through the overloaded district courts flies in the face of Congressional intent. It should not be left to stand. This is an especially ripe issue since the trend towards creation of new BAP's will inevitably cause this issue to surface. So why not cut off this unproductive controversy here? To overturn the Ninth Circuit's ruling is harmless to the Circuit, since appealability ordered under 28 U.S.C. §1292(b) by a BAP

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[37] (There is no reason to infer from ... section 1292 ... of title 28 that Congress meant to limit appellate review of interlocutory orders) Connecticut Nat. Bank Id, Headnote 4.

[38] An available option to the appealing parties under 28 U.S.C. §158 (c)(1)(A) or (B); see page 3 supra

would not void the Circuit's discretion in taking action thereon. So by denying jurisdiction in our matter, the Ninth Circuit departed far from the usual course of judicial proceedings envisioned by congress in this matter which calls for an exercise of this Court's supervisory power.

The Supreme Court principle in conflict with the Ninth Circuit's published denial of its statutory jurisdiction (albeit discretionary) found in Connecticut Nat. Bank is:

> " .... So long as a party to a proceeding or case in bankruptcy meets the conditions imposed by § 1292, a court of appeals may rely on that statute as a basis for jurisdiction ... Justice Stevens, concurring .. [at 255] The legislative record, however, contains no mention of an intent to limit the scope of § 1292(b).."

The BAP met the conditions 28 U.S.C. §1292(b) spelled out for district court judges to enable appealability[39]. Nevertheless, the Ninth Circuit ruled that Congress **did** intend to limit appellate review under 28 U.S.C. § 1292(b) by confining it to **district** judges. This is in direct conflict with the Connecticut Nat. Bank ruling that Congress **did not** intend to limit appellate review under 28 U.S.C. §1292(b). Accordingly,

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[39] The BAP ordered " ... substantial differences exist among the circuits' treatment of bifurcation of home mortgages that contain additional collateral language ... (leave to appeal is appropriate when differences of opinion exist between controlling issue and immediate appeal may materially advance the ultimate termination of litigation" Lievsay Id. (App. 8).

the Supreme Court ought to reverse the Ninth Circuit on this Second Question summarily.

CONCLUSION

For the reasons stated, Petitioner, Winslow R. Lievsay, prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Winslow R. Lievsay
19471 Jasper Hill Road
Portola Hills, California 92679
(714) 858-1718

Petitioner in pro se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED OCT 31 1997
CATHY A. CATTERSON,
CLERK U. S. COURT OF APPEALS

In re: WINSLOW R. LIEVSAY) Debtor,	)	No. 96-56378 BAP No. CC- 95-01391
	)	RoVJ
WINSLOW R. LIEVSAY Appellant, v. WESTERN FINANCIAL SAVINGS BANK; TERRI E. HAWKINS-ANDERSEN, TRUSTEE, Appellee.	)	ORDER

Before: LEAVY, and TASHIMA, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc,. Fed.R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: WINSLOW R. LIEVSAY,
Debtor.
WINSLOW R. LIEVSAY,
Appellant,

v.

WESTERN FINANCIAL SAVINGS BANK;
TERRI E. HAWKINS-ANDERSEN,
Trustee,
Appellee.

No. 96-56378
BAP No. CC-95-01391-RoVJ

Appeal from the Ninth Circuit Bankruptcy
Appellate Panel Ross, Volinn, and Jones,
Bankruptcy Judges, Presiding

Submitted June 3, 1997*
Filed July 1, 1997

Before: William A. Norris, Edward Leavy, and A. Wallace Tashima, Circuit Judges.

Per Curiam Opinion

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*The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

COUNSEL

Winslow R. Lievsay, Mission Viejo, California, in pro se for the appellant.

Kenneth D. Passon, Suchman, Galfin & Passon, Irvine, California, for the appellee.

OPINION

PER CURIAM:

Chapter 11 debtor Winslow R. Lievsay appeals pro se from the Bankruptcy Appellate Panel's ("BAP") opinion affirming the bankruptcy court's order denying approval of Lievsay's Second Amended Disclosure Statement ("Chapter 11 plan"). We dismiss for lack of jurisdiction.

[1] "Although both parties contend that we have jurisdiction over this appeal, we have an independent duty to examine the propriety of our subject matter jurisdiction. " Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Village Resort, Ltd.), 81 F.3d 103, 105 (9th Cir. 1996). This court has jurisdiction over final orders of the bankruptcy appellate panel reviewing bankruptcy court decisions. See 28 U.S.C. S 158(d); see also United States v. Technical Knockout Graphics, Inc. (In re Technical Knockout Graphics, Inc.), 833 F.2d 797, 800 (9th Cir. 1987). However, this court does not have discretion to hear interlocutory appeals under section 158(d). Security Pac. Bank Wash. v Steinberg (In re Westwood Shake & Shingle, Inc.), 971 F.2d 387, 389 (9th Cir. 1992).

[2] In this case we must first look to the nature of the underlying bankruptcy court order. Id. If the underlying bankruptcy court decision is interlocutory, the BAP order affirming or reversing it is also interlocutory. Id. ; Allen v. Old Nat'l Bank (In re Allen), 896 F.2d 416, 418 (9th Cir. 1990) (per curiam). We hold that a bankruptcy court's decision denying confirmation of a Chapter 11 plan is interlocutory. See Nicholes v. Johnny Appleseed (In re Nicholes), 184 B.R. 82, 86 (B.A.P. 9th Cir. 1995); see also Flor v. Bot Fin. Corp. (In re Flor), 79 F.3d 281, 283 (2d Cir. 1996); Pleasant Woods Assocs. Ltd. Partnership v. Simmons First Nat'l Bank (In re Pleasant Woods Assocs. Ltd. Partnership), 2 F.3d 837, 838 (8th Cir. 1993) (per curiam); Simons v. Federal Deposit Ins. Corp. (In re Simons), 908 F.2d 643, 645 (10th Cir. 1990) (per curiam). Accordingly, because the underlying order is interlocutory, section 158(d) does not confer jurisdiction on this court. See In re Westwood Shake & Shingle, Inc., 971 F.2d at 389.

[3] Jurisdiction is also not conferred on this court by either 28 U.S.C. SS 1291 or 1292. Neither section 1291 nor 1292 applies to appeals from the BAP. See 28 U.S.C. SS 1291 & 1292; Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.), 968 F.2d 887, 890-91 (9th Cir. 1992).

APPEAL DISMISSED.[1]

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[1] Lievsay's motion for leave to appeal from an interlocutory order is denied.

BAP DECISION UPON DE NOVO REVIEW OF BANKRUPTCY COURT - AUGUST 14, 1996

In re Winslow R. LIEVSAY, Debtor.
Winslow R. LIEVSAY, Appellant.

v.

WESTERN FINANCIAL SAVINGS BANK, f.s.b., A Federal Savings Bank; and United States Trustee, Appellees.

BAP No. CC-95-1391-RoVJ.
Bankruptcy No. SA 94-21241 JW.

United States Bankruptcy Appellate Panel of the Ninth Circuit.

Argued and Submitted Nov. 16, 1995.
Decided Aug. 14, 1996.

Winslow R. Lievsay, Mission Viejo, CA. Pro se.
Kenneth D. Passon, Irvine, CA for Western Financial Savings Bank.

OPINION

Before ROSS[1] , VOLINN and JONES, Bankruptcy Judges.

VOLINN, Judge

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[1] Hon. Herbert A. Ross, Bankruptcy Judge for the District of Alaska, sitting by designation.

INTRODUCTION

The debtor's chapter 11 disclosure statement proposed to strip down a lien secured by his principal residence. Although generally debtors are not permitted to strip down a lien secured by the Debtor's personal residence, the debtor argued that "boilerplate" language contained in the deed of trust should have been construed to secure property other than his residence, especially since he maintained an office at the residence. The court refused to interpret the deed of trust broadly and denied approval of the debtor's plan. The Panel granted leave to appeal an interlocutory order and affirms.

BACKGROUND FACTS

Winslow Lievsay, the debtor, filed his chapter 11 petition in November, 1994, His assets included real property which served as both his primary personal residence and his business office. The property, which had a fair market value of approximately $260,000, was subject to a secured claim by Western Financial Savings Bank ("WFSB") of approximately $312,000.[2] The debtor's plan proposed to "strip-down" his home mortgage and bifurcate WFSB's claims into secured and unsecured components pursuant to section 506(a)[3]

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[2] The property is also encumbered by a junior lien of $50,000.

[3] Unless otherwise stated, all references to "sections", "§" and rules refer to the U. S. .Bankruptcy Code, 11 U.S.C. §et seq.

Section 506(a) defines allowed secured and unsecured claims as follows:

> An allowed claim of a creditor secured by a lien on property in which the estate has and interest, ... is a secured claim to the extent of the value of such creditor's

WFSB opposed the plan and argued that Section 1123(b)(5),[4] which limits a debtor's ability to strip-down 'a claim secured only by a security interest in real property that is the debtor's principal residence," prohibited the bifurcation of its claim. The debtor argued that section 1123(b)(5) did not prohibit the proposed strip-down because WFSB's claim was secured by property other than the debtor's principal residence, including his business office.[5]

The bankruptcy court found that the multiple uses of the residence and the deed of trust language did not divest WFSB of its section 1123(b)(5) protection[6]. The court found that the intent of section 1123(b)(5) was to protect home mortgage lenders such as WFSB; therefore, the court entered an order denying confirmation of the plan. The debtor filed this timely appeal.

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interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.

[4] Section 1123(b)(5) provides in pertinent part that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, " (West 1996).

[5] The property subject to the deed of included "all the improvements now or hereafter erected on the property, and all easements, rights appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights and stock and all fixtures now or hereafter a part of the property" and all replacements and additions.

[6] The court stated: "every deed of trust contains that kind of language. And if I were to say that because these reservations of certain things are personal[i]ty, the debtor is no longer secured solely by real estate ... I would be breaking new ground which I choose not to break.

[1] Although an order denying confirmation of a plan is interlocutory, the Panel granted leave to appeal as substantial differences exist among the circuits' treatment of bifurcation of home mortgages that contain additional collateral language. *In re Sperna*, 173 B.R. 654, 657-58 (9th Cir. BAP 1994)(order denying confirmation of a plan is a non-appealable interlocutory appeal, but leave was granted because of the substantial differences of opinion on the controlling issue); *In re Nicholes*, 184 B.R. 82, 86-87 (9th Cir. BAP 1995)(leave to appeal is appropriate when differences of opinion exist between controlling issue and immediate appeal may materially advance the ultimate termination of litigation).

ISSUE

Whether "boilerplate" language contained in a deed of trust which could be read to secure property other than the debtor's personal residence, excludes the debt from the protection offered by section 1123(b)(5) to home mortgage lenders and allows bifurcation of the claim into secured and unsecured portions.

STANDARD OF REVIEW

The bankruptcy court's interpretation of the statute is subject to de novo review. *In re Consolidated Pioneer Mortgage*, 178 B. R. 222 (9th Cir. BAP 1995). The court based its determination on undisputed facts, and a court's factual findings, whether written or oral, are subject to the clearly erroneous standard of review. *Ankeny v. Meyer (In re Ankeny)*, 184 B.R. 64,68 (9th Cir. BAP 1995); Fed R. Bankr.P. 8013

DISCUSSION

Section 1123(b)(5) was added to the Bankruptcy Code in 1994 to harmonize the treatment of home mortgage loans in Chapter 11 and Chapter 13. *See* H.R.Rep. No. 103-834, 103d Cong., 2nd Sess. at 22 (1994), U.S. Code Cong. & Admin.News 1994 at 3323, *reprinted in Norton Bankruptcy Law and Practice 2d* (1995-1996 ed.) a 1013. Because section 1123(a[b])(5) is relatively new, there are few cases interpreting its effect. There is, however, extensive case law regarding the interaction of section 506 and section 1322(b)(2)[7] Given the Congressional intent to harmonize the two chapter's treatment of home mortgages, and the nearly identical language of the two sections, we will use these cases to guide us here.

The specific question we address is whether section 1123(a[b])(5) precludes a chapter 11 debtor from relying on section 506(a) to modify the unsecured portion of an undersecured mortgage claim, or whether the debtor is entitled to bifurcate a secured claim pursuant to section 506(a).

Although this question is apparently one of first impression in this circuit, other circuits have addressed the interaction of section 506(a) and section 1322(b)(2). The Sixth Circuit, for instance, has found that "the clear weight of authority supports a finding that the addition of the boilerplate phase 'rents, royalties, profits, and fixtures' to a mortgage or deed of trust will not generally remove the claim from the

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[7] Section 1322(b)(2) provides in pertinent part that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence...." (West 1996).

protection of s 1322(b)(2)." *In re Davis*, 989 F.2d 208, 212 (6th Cir. 1993). On the other hand, the Third Circuit found that a deed of trust which secured "any and all appliances, machinery, furniture and equipment (whether fixtures or not) of any nature whatsoever now or hereinafter installed in or upon the premises" constituted additional security and, therefore, section 122(b)(2) did not prohibit the modification of the mortgage. *Wilson v. Commonwealth, Mortgage Corp.*, 895 F.2d 123, 124 (3d Cir. 1990). See also *In re Ramirez*, 62 B. R. 668 (Bankr.S.D.Cal.1986)(finding that the bank had a security interest in property that contained both the debtor's principal residence and rental units, and where rental income was significant portion of debtor's income was relied upon by the bank when approving debtor's loan, the loan was not secured only by property that was the debtor's principal residence and therefore could be modified).

Although the language in this deed of trust is not identical to that considered by the *Davis* court, we agree with the Sixth Circuit's analysis that, unlike the language in the deed of trust in *Wilson*, "the language in the case *sub judice* does not extend [the secured creditor's] security interest beyond items which are inextricably bound to the real property itself as a part of the possessory bundle of rights." *Davis*, 989 f.2d at 213. *See also, In re Eastwood*, 192 B.R. 96, 104-05 (Bankr.D.N.J.1996) (finding that language identical to that considered here did not grant "additional collateral" to the bank holding the security interest in the debtor's property), *But see In re Pinto*, 191 B.R. 610,614 (Bankr.D.N.J.1996) (on identical language, finding that the bank had a "security interest in

additional collateral" and therefore was not within the protection of the antimodification provision). Thus, although the debtor argues the language of the deed of trust demonstrates that its reach is greater than a security interest in his residence alone, he has not shown that to be the case,[8]

The debtor also argues that the fact that his office is in his home changes the result. In *Ramirez*, the court stated that "[i]n the absence of a showing that the debtors clearly used [their property] for any principal purpose other than their residence, [this court] must consider the entire ... property as their principal residence" Ramirez, 62 B.R. at 669 (quoting *In re Ballard*, 4 B.R. 271, 278 (Bankr.E.D.Va.1980)). Here, the debtor has shown that he used the property for his office. However, he has not shown that this use added significant value to the property or that the bank relied on the additional security offered by his home office. In the absence of that proof, we are not prepared to say that the bank had sufficient security in assets what were not part of the debtor's principal residence that the bank should be denied the protection of section 1123(b)(5).

CONCLUSION

Section 1123(b)(5) is intended to protect a particular class of lenders; its reach should be construed strictly to keep the lender from overreaching and to effectuate the fresh start policy of the Code. However, the "additional

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[8] While it is true that, were a gold mine to be developed on the subject property, the bank would doubtless assert a collateral interest in it, there is no indication of the possibility that such an interest might exist.

collateral" language in the deed of trust is so closely associated with securing the primary residence that it prohibits Debtor from stripping down the lien under section 1123(b)(5). Therefore, we AFFIRM the court's order denying approval of Debtor's plan.

[RESPONDENT'S ADDITIONAL LOAN SECURITY]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WINSLOW R. LIEVSAY, Appellant, vs. WESTERN FINANCIAL SAVINGS BANK, F.S.B., a Federal Savings Bank, and UNITED STATES TRUSTEE, Appellees.	No. 96-56378 BAP No. CC-95-1391 RoVJ Bankruptcy No. SA 94-21241 JW Chapter 11

ON APPEAL FROM THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT COURT

EXCERPTS OF RECORD...

TAB ITEM.... CLERKS RECORD

1. MOTION TO ANNUL AUTOMATIC STAY OR, IN THE ALTERNATIVE, FOR ADEQUATE PROTECTION; AND DECLARATION OF CHRISTOPHER VOLKOV FILED NOVEMBER 30, 1994 ..... CR 6

...

DEED OF TRUST [EXHIBIT "2" TO THE MOTION]

... THIS DEED OF TRUST ("Security Instrument") is made on January 2, 1990. The trustor is WINSLOW R. LIEVSAY ...

("Borrower") ... The Beneficiary is [Respondent] ... ("Lender") ... This ... Instrument secures to Lender ... the repayment of the debt ... For this purpose, Borrower irrevocably grants and conveys ... all easements, rights, appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights and stock and all fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. ...

Funds for Taxes and Insurance ... Borrower shall pay to Lender ... a sum ("Funds") equal to ... property taxes and assessments ... ground rents ... insurance premiums ... called "escrow items" ... pledged as additional security for the sums secured by his Security Instrument ...

Lender in Possession ... Upon acceleration ... Lender (in person, by agent or by judicially appointed receiver) shall be entitled to enter upon, take possession of and manage the Property and to collect the rents of the Property. ... Any rents collected ... shall be applied ... to the sums secured by this Security Instrument. ...

/s/ Winslow R. Lievsay
WINSLOW R. LIEVSAY Borrower ...
On this 3rd, day of January, 1990 ...